



## **STATEMENT OF THE CASE**

Willie L. Amos appeals the trial court's denial of his petition for post-conviction relief. He raises two issues for our review, which we restate as whether Amos was denied the effective assistance of counsel at any point because none of his attorneys raised a purported issue under former Indiana Code Section 31-6-7-3.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In Amos' direct appeal, we stated the relevant facts for Amos' conviction for Attempted Murder, a Class A felony, as follows:

At the time of the incident, Amos was 17 years old. He had, previously, dated Comeeka Lewis and together they had a child. Comeeka Lewis, Comeeka's daughter (fathered by Amos), Comeeka's mother Judy Lewis, and Comeeka's brother Edmund resided at 3606 South Hanna in Fort Wayne, Indiana. On June 4, 1994, Damion Johnson, Comeeka's boyfriend was spending the night at the Lewis' house. In the early morning hours of June 5, 1994, Johnson retired upstairs and fell asleep on a bedspread placed upon the floor in the corner of one of the upstairs bedrooms. Johnson slept face down on his stomach, cradling his head on his arms.

That same morning, Judy was sleeping in the adjoining bedroom. She awakened to turn off her television. As she did so, Judy heard someone ascending the stairs. Thinking that the individual was her son, Edmund, Judy called out, "Little Man, is that you?" Although the person responded, "Yes, momma," Judy knew that the individual was not her son. The individual proceeded into the next bedroom and fired five or six shots. The individual then ran down the stairs and exited the house.

Judy called 911 and waited in the basement for police officers to arrive. When the officers arrived, Judy told them that the person she saw pass her door that morning was wearing a blue jean hat that covered the eyes, no shirt, yellow-striped shorts, and white "shell-toed" gym shoes. Amos also appeared at the crime scene. When Judy saw that Amos was wearing white shell-toed gym shoes, she told a police officer that Amos was the shooter.

The officer asked Amos to accompany him to the police station, and Amos agreed. However, because Amos was a juvenile, he was not immediately questioned by police officers. Instead, the officers contacted Amos' father, Thomas Morgan, and asked him to come to the police station. After Amos' father arrived, the two were advised of Amos' constitutional rights. Thereafter, both Amos and Morgan signed the waiver of rights form. After the form was signed, the officers then told Morgan that Amos was a prime suspect in the shooting incident that occurred on South Hanna. The officers then left the room giving Amos and Morgan an opportunity to confer with one another. Approximately eight minutes later, the officers were called back into the room, and Morgan agreed to allow the officers to interview Amos.

Initially, Amos denied involvement in the shooting incident. He also stated that he had not fired a gun recently. At that point, the officers told Amos that they had a way of attempting to determine whether he had fired a gun in the last few hours and asked Amos if he would submit to a gunpowder residue test. Although the test results are less than accurate, an officer testified that the purpose of offering the test was to obtain additional information from Amos as to his involvement in the incident.

After Amos submitted to the gunpowder residue test, both Amos and Morgan agreed that Amos would give a video taped statement of the events of June 5, 1994. One of the officers then left the room to obtain a video tape. When he returned, Judy was standing in the doorway of the interview room attempting to talk to Amos. Judy asked Amos why he shot Johnson. Although Amos did not reply, he shortly thereafter gave a full statement as to his involvement in the shooting incident, stating that he entered the house through the unlocked front door, climbed the stairs, entered the bedroom where Johnson slept, and shot Johnson, believing that Johnson was an individual named Koulon Lewis. After giving the informal statement, Amos then gave a formal video taped statement confessing to the shooting of Johnson. Amos' father remained with Amos throughout the interview.

Prior to trial, Amos' statement was challenged by the defense in a motion to suppress which was denied after a hearing was held. At trial, Amos testified and recanted his confession. Nevertheless, the jury found Amos guilty of attempted murder.

Amos v. State, No. 02A03-9512-CR-431 (Ind. Ct. App. May 19, 1997) (footnote omitted)

(“Amos I”). During the trial, Amos and Morgan each testified that Amos lived with

Morgan at the time Amos shot Johnson and during Amos' subsequent arrest and confession.

Amos raised five issues for our review on direct appeal, including whether he received the effective assistance of trial counsel. On that issue, Amos' appellate counsel argued that Amos' trial counsel was ineffective for the following four reasons: (1) trial "counsel failed to call Amos' father to testify at the suppression hearing"; (2) "counsel failed to present evidence at the suppression hearing as to Amos' alleged intoxication at the time his confession was given"; (3) "counsel failed to point out to the trial judge the inconsistencies in Detective Rogers' testimony"; and (4) "counsel failed to tender an instruction alerting the jury of the voluntariness of and weight afforded confessions." Id. at \*14. We rejected each of the errors alleged by Amos' appellate counsel and affirmed Amos' conviction and forty-five year sentence.

On March 9, 1999, Amos filed his original petition for post-conviction relief, which was amended on April 17, 2006. In his amended petition, Amos alleged the following errors:

- (1) trial counsel rendered ineffective assistance in failing to seek suppression of Petitioner's confession on the ground that "meaningful consultation" with a custodial parent, guardian, custodian or guardian ad litem, as required by IC 31-6-7-3 (now IC 31-32-5-1), had not occurred because the parental rights of Petitioner's biological father, Thomas Morgan, had previously been terminated;
- (2) appellate counsel rendered ineffective assistance in failing to raise a claim of error on the same ground;
- and (3) appellate counsel rendered ineffective assistance in failing to challenge [the appropriateness] Mr. Amos' sentence.

Appellant's App. at 140-41. The State filed its answer to Amos' amended petition on May 16, 2006, and the post-conviction court held an evidentiary hearing on September

18. At that hearing, both Amos and Morgan testified that Amos did not live with Morgan either at the time Amos shot Johnson or when Amos confessed and signed his waiver of rights form.

On January 10, 2007, the post-conviction court entered findings of fact and conclusions of law denying Amos' petition. Specifically, the court stated in relevant part as follows:

9. The parties do not dispute that Thomas Morgan's parental rights had been legally terminated long before Petitioner gave his confessions. No credible evidence, however, suggests that [trial] attorney Snyder knew or should have known of the termination of parental rights at any time during the original proceeding. Likewise, no credible evidence suggests that [appellate] attorney Fumarolo knew or should have known of the termination of parental rights at any time during his representation of Petitioner. Neither Snyder nor Fumarolo raised any issue regarding the termination of parental rights.

10. The charging information gives Petitioner Amos' address as 2529 Caroline Street; the Petition to Adjudge Delinquency states that the person having guardianship (etc.) is the father, Thomas Morgan, living at 2529 Caroline Street; the Bail Commissioner's report says Amos was living with his father on Caroline Street for one year. The testimony of Fort Wayne Police detective Fred Rogers at trial suggests that Amos had spent some time at his grandmother's house, but establishes nothing definite as to where he lived at the time of the confession. Morgan, while being questioned at trial about the events of June 4 and 5, 1995, testified that Willie (Amos) lived with him; Amos himself testified at trial that, prior to being arrested on June 5, 1994, he lived at 2529 Caroline with his father, Thomas Morgan. No credible evidence suggests that either Snyder or Fumarolo knew or should have known that Amos did not live with Morgan (if, in fact, he did not). Neither Snyder nor Fumarolo testified at the post-conviction hearing about anything that might even have raised a question in their minds on this point.

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13. The Court finds that Morgan's and Amos' allegations about where Amos lived at the time of the offense, presented in the[ir] post-conviction testimon[ies,] . . . are not worthy of credit[.]

Id. at 142-43 (citations to the record omitted). The court then denied Amos' subsequent Motion to Correct Error, and this appeal ensued.

## **DISCUSSION AND DECISION**

### **Standard of Review**

Amos contends that his request for post-conviction relief was improperly denied because "Trial, Appellate and Post-Conviction Counsel have all failed to properly assert Amos' rights under the statute, which has resulted in a complete denial of a fair trial." Appellant's Brief at 4. The former statute Amos relies on, now codified at Section 31-32-5-1, provided in relevant part as follows:

(a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:

(1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver; or

(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

(A) That person knowingly and voluntarily waives the right;

(B) That person has no interest adverse to the child;

(C) Meaningful consultation has occurred between that person and the child; and

(D) The child knowingly and voluntarily joins with the waiver.

(b) The child may waive his right to meaningful consultation under subdivision (a)(2)(C) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or attorney, and if the waiver is made knowingly and voluntarily.

Ind. Code § 31-6-7-3 (1988). Thus, Amos asserts that, at the time he signed his waiver of rights form and confessed his attempted murder to police, both in the presence of Morgan, Morgan was not a “custodial parent, guardian, custodian, or guardian ad litem,” and therefore Amos was denied his right to meaningful consultation.

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting the post-conviction court’s judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Id. at 468-69. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. Id. at 469. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse only “upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” Id. (quoting Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quotation omitted), cert. denied, 534 U.S. 830 (2001)). Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

### **Trial Counsel**

Amos first maintains that his trial counsel rendered ineffective assistance for not raising the issue of whether Morgan satisfied the requirements of former Indiana Code Section 31-6-7-3. However, as noted above, Amos raised the issue of his trial counsel’s

effective assistance on direct appeal. “It has long been the rule that a defendant who raises a claim of ineffective assistance of trial counsel on direct appeal is foreclosed from subsequently relitigating that claim.” McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002). As such, Amos’ claim of ineffective assistance of trial counsel is barred by the doctrine of res judicata. See id.

### **Appellate Counsel**

Amos next asserts that he was denied the effective assistance of appellate counsel because his appellate counsel failed to raise the specific instance of ineffective trial counsel now complained of. When the claim of ineffective assistance is directed at appellate counsel for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on post conviction. McCary, 761 N.E.2d at 393 (quoting Timberlake v. State, 753 N.E.2d 591, 604 (Ind. 2001)). The post-conviction court must conclude that appellate counsel’s performance was deficient and that, but for the deficiency of appellate counsel, trial counsel’s performance would have been found deficient and prejudicial. Id. Thus, Amos’ burden before the post-conviction court was to establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel.

A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the “counsel” guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a



reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Few points of law are as clearly established as the principle that "tactical or strategic decisions will not support a claim of ineffective assistance." McCary, 761 N.E.2d at 392 (quoting Sparks v. State, 499 N.E.2d 738, 739 (Ind. 1986)). We afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Id. (citing Strickland, 466 U.S. at 689-90). Judicial scrutiny of counsel's performance should not be exercised through the distortions of hindsight. Emerson v. State, 648 N.E.2d 705, 707 (Ind. Ct. App. 1995).

Again, Amos contends that his appellate counsel rendered ineffective assistance for not raising trial counsel's purported ineffective assistance on the issue of whether Morgan met the requirements of former Indiana Code Section 31-6-7-3.<sup>1</sup> But it is undisputed that, under that statute, "custodian" included "a person with whom a child resides." See Tingle v. State, 632 N.E.2d 345, 352 (Ind. 1994). And here, the post-conviction court found overwhelming evidence that supported the conclusion that Amos lived with Morgan at the time Amos committed attempted murder, signed his waiver of

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<sup>1</sup> To the extent that Amos argues that his appellate counsel rendered ineffective assistance for "fail[ing] to raise trial counsel's failure to object[,] [at the suppression hearing,] to the State's request to have the Motion to Suppress denied by stating to the trial court that the defense has not met [its] burden," Appellant's Brief at 19-20, that argument is without cogent reasoning and is therefore waived. See Ind. Appellate Rule 46(A)(8)(a). And insofar as Amos suggests, citing Morgan v. State, 675 N.E.2d 1067, 1074 (Ind. 1996), that the trial court was required to hold a hearing on the voluntariness of his confession, Amos fails to explain how the hearing on his motion to suppress, in which he alleged his confession to have been given involuntarily, did not satisfy that requirement. See Amos I, slip op. at 4-10. As such, we also do not review that argument.

rights form, and confessed to the police. That evidence included Amos' testimony at trial that, "prior to being arrested on June 5, 1994, he lived at 2529 Caroline with his father," and Morgan's trial testimony in which he stated that "Willie (Amos) lived with him." Appellant's App. at 142.

Although Amos and Morgan testified to the contrary at the post-conviction proceedings, the court expressly found those testimonies "not worthy of credit." Id. at 143. Thus, Amos' attempt to persuade this court that he did not live with his father at those times, and that Morgan therefore could not have met the relevant statutory requirements, amount to a request for this court to reweigh the evidence, which we will not do. See Hall, 849 N.E.2d at 468-69. As the evidence at Amos' trial supported the conclusion that Morgan was a custodian of Amos for purposes of the former Indiana Code section at issue, neither Amos' trial counsel nor his appellate counsel could have rendered ineffective assistance for not raising the issue Amos now raises. See Schick v. State, 570 N.E.2d 918, 927 (Ind. Ct. App. 1991) ("[U]nrealistic defenses need not be pursued by trial counsel.").

### **Post-Conviction Counsel**

Finally, Amos argues that his post-conviction counsel also rendered ineffective assistance. But post-conviction proceedings are not regarded as criminal actions and need not be conducted under the standards followed in those actions. Graves v. State, 823 N.E.2d 1193, 1196 (Ind. 2005) (discussing Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989)). Rather, our Supreme Court has "held unanimously that a claim of defective performance [of post-conviction counsel] 'poses no cognizable grounds for post-

conviction relief.” Id. (quoting Baum, 533 N.E.2d at 1200-1201). Hence, “if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court[,] . . . it is not a ground for post-conviction relief that petitioner’s counsel . . . did not provide adequate legal assistance.” Id. (citations and quotations omitted).

Here, Amos does not dispute that his post-conviction counsel “in fact appeared and represented” him. See id. Instead, Amos asserts that “he was not represented in a ‘procedurally fair setting’ because his Post-Conviction Counsel failed to follow the proper legal standard.” Appellant’s Brief at 27. But Amos mistakenly equates “a procedurally fair setting” with his counsel’s legal assistance.<sup>2</sup> Because Amos argues that he is entitled relief based on the conduct of his attorney, Amos fails to state a cognizable claim on this issue. See Graves, 823 N.E.2d at 1196.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.

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<sup>2</sup> Further, Amos concedes that his counsel filed both an amended petition for post-conviction relief and a brief in support of that petition, and that his counsel presented evidence during a hearing on that petition.